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civil courts.²¹ The Court dismisses the prisoners' claim of deprivation of "due process of law" by the rationale that; the "due process" clause cannot justifiably apply to enemy aliens where American soldiers do not have a commensurate right,²² nor would it be fair to offer use of our courts to aliens where there would be no equivalent reciprocity from the foreign state to our soldiers.²³

The dissent contends that the majority ruling has created a paradox in the law.²⁴ If a prisoner of war were to be confined within the territory of the United States he would be allowed his hearing,²⁵ but if the Government chose to imprison him outside the courts' territorial jurisdiction he would be denied it on the basis of the present decision.²⁶ It goes on further to state that the Supreme Court, in refusing jurisdiction, has abdicated its sole means of checking upon the actions of military tribunals.²⁷

Apparently, as a result of the instant decision, the military commissions, outside the jurisdiction of any federal court, are now a separate and distinct unit empowered to function without any review by the judicial system, but past decisions²⁸ show that it is not unusual to leave expansive powers in other parts of the Government during time of war. It is problematical whether the courts will again be concerned with this problem in view of the possibility that the United Nations will, in the future, take jurisdiction over such prisoners. As in the Korean situation, war will most likely be carried on under color of authority of the United Nations. Punishment of the perpetrators of war will be the manifest responsibility of that organization, and the United States, if it establishes military tribunals for such purposes, will only be doing so as its agent.

JUDGES—PENSIONS—WAIVER WHILE HOLDING OTHER PUBLIC OFFICE

A retired judge of the state of Florida received retirement pay¹ from a fund, established by statute,² to which contributions were voluntarily made. The state constitution provided that if he filed a certificate of willingness, a retired judge could be recalled to active duty.³ Upon appointment

21. *Ibid.*

22. *Id.* at 947.

23. *Id.* at 944.

24. *Id.* at 952 (dissenting opinion).

25. *Ibid.*

26. *Ibid.*

27. *Id.* at 958 (dissenting opinion).

28. *Yakus v. United States*, 321 U.S. 414 (1943); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

1. Retirement pay, as distinguished from a pension, is received from a fund to which employee contributed. See *Raines v. Board of Trustees*, 365 Ill. 610, 7 N.E.2d 489 (1937).

2. FLA. STAT. § 38.14 (1949).

3. FLA. CONST. Art. 5, § 49 (erroneously numbered § 46 by the legislature).

to the bench of a United States court, the judge requested a declaratory decree as to the effect upon his retired status of accepting the federal appointment. *Held*, that the retired judge, having withdrawn his consent to be recalled to active duty for the state, may remit retirement pay while serving as an official of the United States, and retain his right to resume the retired status⁴ and to again receive retirement pay provided by state law. *Gay v. Whitehurst*, 44 So.2d 430 (Fla. 1950).

There is a definite conflict of opinion whether compliance with the statutory requirements for retirement with pay gives an officer a vested right, to retire and draw the retirement compensation, which cannot afterward be revoked or impaired.⁵ In most jurisdictions the courts have held that legislative bodies retain the right to amend or repeal the provisions of statutes creating pension funds,⁶ permitting the legislative body to abolish the fund at will.⁷ These decisions are based on the objection to compelling the governmental unit to continue a policy or program after the conditions under which it was originated have changed.⁸ Therefore, a retired officer does not have an absolute vested right⁹ to a pension or to retirement pay¹⁰. Thus, there is a limitation on the several theories which give an officer somewhat vested rights, once the conditions of the system are met.¹¹ These are rights only under conditions set by the legislative body, with no right to receive any specified sum or terms and conditions of payment.¹² The limited rights are derived from several theories. Under one, the pension laws constitute either implied terms in the employment contract,¹³ or the terms of a separate unilateral contract accepted by fulfilling the statutory requirements.¹⁴ Another theory is that a pension is compensation, for which the employee contracted as an annuity,¹⁵ or which was withheld to induce long

4. *Ibid.* (In this status a retired circuit judge is qualified to perform his former duties when called upon.)

5. 3 McQUILLIN ON MUNICIPAL CORPORATIONS, § 12.144 (2d ed. 1940); see 23 MINN. L. REV. 540 (1939).

6. *Pennie v. Ries*, 132 U.S. 464 (1889); *Voorhees v. Miami*, 145 Fla. 402, 199 So. 313 (1940); *Holton v. Tampa*, 119 Fla. 556, 159 So. 292 (1934) (but cannot deprive of all pay through regulation).

7. *Dallas v. Trammell*, 129 Tex. 150, 101 S.W.2d 1009 (1937).

8. *Holton v. Tampa*, *supra* note 6; *Dallas v. Trammell*, *supra* note 7.

9. *Holton v. Tampa*, *supra* note 6; *Voorhees v. Miami*, *supra* note 6; *Dallas v. Trammell*, *supra* note 7.

10. *Dallas v. Trammell*, *supra* note 7; cf. *Raines v. Board of Trustees*, 365 Ill. 610, 7 N.E.2d 489, 491 (1937).

11. *Voorhees v. Miami*, *supra* note 6; *Roddy v. Valentine*, 268 N.Y. 228, 197 N.E. 260 (1935); *Dallas v. Trammell*, *supra* note 7.

12. *Holton v. Tampa*, *supra* note 6.

13. *Dallas v. Trammell*, *supra* note 7.

14. *Anders v. Nicholson*, 111 Fla. 849, 150 So. 639 (1933); *Raines v. Board of Trustees*, *supra* note 10; *Roddy v. Valentine*, *supra* note 11; *Griebble v. Board of Managers*, 105 Pa. 452, 161 Atl. 588 (1932).

15. *Holton v. Tampa*, *supra* note 6; *McBride v. Retirement Board of Alleghany County*, 330 Pa. 402, 199 Atl. 139 (1938).

and faithful service.¹⁶ A different theory is that there has been reliance on the promised bounty or gift of the state.¹⁷

However, there may be a definite vested right to receive retirement pay, once the statutory conditions have been complied with, which cannot be altered by legislative act¹⁸ or by constitutional amendment.¹⁹ The rights to participate in a fund to which the employee voluntarily contributed are usually vested,²⁰ while limited rights are allowed when no contributions or mandatory contributions are made.²¹ Sometimes retired officers are required to waive pension payments, without jeopardy to pension status, while employed in public office.²² Also, payment of pensions has been allowed to retired officers drawing compensation as governmental officials.²³ Therefore, a retired officer's rights to retirement pay, while usually limited, sometimes are definite and vested. Both lines of authority use the same reasoning without drawing distinctions which would justify the diverse conclusions.

Most Florida cases²⁴ construe pension regulations liberally in favor of the employee, with the intent of the legislature controlling.²⁵ The instant case appears to extend the law so as to definitely include this state among those which give a vested right to draw retirement compensation, without legislative change, once statutory requisites have been met.²⁶ The court then held that a vested right can be waived.²⁷ So the pension can be waived, and later resumed. Under the controlling statute²⁸ after the requirements are met, the officer can voluntarily retire and receive pay. The state constitutional amendment²⁹ permits the judge to voluntarily assume the special retired status under which he is subject to call when needed. It appears that voluntary return to active duty would not cause forfeiture of retirement pay or status when the duty was terminated. Since the constitution

16. *Voorhees v. Miami*, *supra* note 6; *DeWolf v. Bowley*, 355 Ill. 530, 189 N.E. 893 (1934).

17. *Geddes v. United States*, 38 Ct. Cl. 428 (1903).

18. *Anders v. Nicholson*, *supra* note 14; *Roddy v. Valentine*, *supra* note 11.

19. See *McBride v. Retirement Board*, note 15 *supra*, at 132.

20. *State ex rel Stringer v. Lee*, 147 Fla. 37, 2 So.2d 127 (1941); *Anders v. Nicholson*, *supra* note 14; *Raines v. Board of Trustees*, *supra* note 10.

21. *Holton v. Tampa*, *supra* note 6; *Raines v. Board of Trustees*, *supra* note 10; *Turner v. Passaic Pension Comm'n*, 10 N.J. Misc. 1270, 163 Atl. 282 (1932). *Contra*: *McBride v. Retirement Board*, *supra* note 15.

22. *Turner v. Passaic Pension Comm'n*, *supra* note 21; *Griable v. Board of Managers*, *supra* note 14.

23. *Geddes v. United States*, *supra* note 17. Cf. *Ferguson v. LaGuardia*, 281 N.Y. 678, 23 N.E.2d 14 (1939) (received amount he had paid in, plus interest); *Stringer v. Lee*, *supra* note 20; *Roddy v. Valentine*, *supra* note 11; *Lamb v. Boone*, 237 Iowa 273, 21 N.W.2d 462 (1946); *McBride v. Retirement Board*, *supra* note 15.

24. *Stringer v. Lee*, *supra* note 20; *Voorhees v. Miami*, *supra* note 6; *Holton v. Tampa*, *supra* note 6; *Anders v. Nicholson*, *supra* note 14.

25. 3 McQUILLIN ON MUNICIPAL CORPORATION, *supra* note 5, at 504.

26. *Gay v. Whitehurst*, 44 So.2d 430 (Fla. 1950).

27. *Ibid.* See *Turner v. Passaic Pension Comm'n*, *supra* note 21; *Griable v. Board of Managers*, *supra* note 14.

28. FLA. STAT. § 38.14 (1949).

29. FLA. CONST. Art. 5, § 49.

states that he cannot be required to serve against his will, it would seem to permit him to refuse to serve at any time he might be called upon, for example if he were ill or away, without losing the right to serve when needed again. If he refused because his other duties were under the federal appointment, rather than the state, he should not lose his rights to retain this special status. Thus, the court can be justified in allowing the retired judge to temporarily withdraw his certificate of willingness to serve, and retain the right to later resume retirement status and pay.

The suggestion raised by the dissenting opinion,³⁰ that a retired state officer may be violating the constitutional prohibition³¹ against dual-office holding, can be answered by the definition of an "officer". One holding an office must perform³² a continuous duty or service,³³ in a permanent position³⁴ where he exercises a public trust,³⁵ including a portion of the sovereign authority.³⁶ In the instant case the retired judge cannot be considered to be holding office while on retired status, and certainly not while rights to that status and to retirement pay have been waived.

However, the court did not rule on this question, so any future decision involving it could be decided either way. The tendency of Florida opinions on the nature of a pension right appears to differ from the trend elsewhere. A similar trend could develop on the problem of dual-office holding, in connection with the retired status of the Florida judiciary.

TAXATION—INTERSTATE COMMERCE—STATE LICENSE AND PRIVILEGE TAX ON MOTOR VEHICLES

A Maryland statute¹ requires the payment of a vehicle registration tax on all vehicles operating in interstate commerce within the state borders. The tax is upon the purchase price of the vehicles. Plaintiff, an interstate common carrier, sought to operate its busses within the state without paying the tax. It was contended that such a tax is a burden on interstate commerce in that the formula of taxation has no relationship to the actual use or the regulation of the state highways. *Held*, that the tax is valid and enforceable. The state has a right to fair compensation for the use of its highways

30. *Gay v. Whitehurst*, *supra* note 26, at 433.

31. FLA. CONST. Art. 15, § 15.

32. *Reed v. Sehon*, 2 Cal. App. 55, 83 Pac. 77 (1905).

33. *Reed v. Sehon*, *supra* note 32; Advisory Opinion to Governor, 146 Fla. 622, 1 So.2d 636 (1941).

34. Advisory Opinion to Governor, *supra* note 33; *Fennell v. Silmot*, 127 Misc. 791, 217 N.Y. Supp. 477 (1926).

35. Advisory Opinion to Governor, *supra* note 33; *Harris v. Watson*, 201 N.C. 661, 161 S.E. 215 (1931).

36. *Abbott v. McNutt*, 218 Cal. 225, 22 P.2d 510; *State ex rel Dressshell v. Miami*, 153 Fla. 90, 13 So.2d 707 (1943).

1. MD. ANN. CODE GEN. LAWS, art. 66½, §25A, art. 81, §218 (Cum. Supp. 1947).